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No. : 04-1432

Supreme Court, U.S.
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In the

Supreme Court of the United States

S. James Brown, Joint Tenant Trustee,

Petitioner,

v.

MONTGOMERY COUNTY, MONTGOMERY COUNTY BOARD OF ASSESSMENT, MONTGOMERY COUNTY TAX CLAIM BUREAU, M. ELIZABETH MCBRIDE, DEPUTY TREASURER FOR THE TAX CLAIM BUREAU, AND AS AN INDIVIDUAL, BOROUGH OF TRAPPE, EDWARD W. GILLESPIE, TAX COLLECTOR FOR THE BOROUGH OF TRAPPE, AND AS AN INDIVIDUAL, AND PERKIOMEN VALLEY SCHOOL DISTRICT,

Respondents.

REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Pages

TABLE OF AUTHORITIES.....ii

INTRODUCTION.....1

REASONS FOR GRANTING THE WRIT.....1

I. Kepoint Preservation Trust Is Not Named As A Party To This Action. Petitioner Brown Is A U.S. Citizen Holding The Right To "Make And Enforce Contracts" And Sue In Every State And Territory, And, As Such, May Plead His Own Case Personally.....1

II. Whether The Respondents' Actions Utilizing State Taxing Powers Violate Petitioner Brown's Federal Rights, Privileges, Or Immunities Arising As A Result Of Contractual Relations Under The U.S. Constitution Is A Federal Question Which Can Only Be Properly Adjudicated Under 42 U.S.C. § 1983.....4

III. Section 1983 Actions In State Court Are Necessary To Provide A Complete And Certain Remedy For The Deprivation of Federal Rights Due To Unconstitutional State Taxation.....8

CONCLUSION.....10

TABLE OF AUTHORITIES

Pages

FEDERAL CASES

Allied Structual Steel Co., v. Spannus,
438 U.S. 234 (1978).....6

Beckus v. Chilivis,
236 Ga. 500, 224 S.E.2d 370 (1976).....8

Beverly Bank v. Board of Review,
117 Ill. App.3d 656, 453 N.E.2d 96 (1983),
cert. denied, 104 S.Ct. 2153 (1984).....8

Board of County Commisioners,
253 U.S. 17 (1920).....1

Chappedelaine v. Dechenaux,
4 Cranch 306, 308.....2

Coolidge v. Long,
282 U.S. 582, (1930).....6

Dutoit v. Board of County Commissioners,
233 Kan. 995, 667 P.2d 879 (1983).....8

Fair Assessment In Real Estate Association, Inc.,
v. McNary,
454 U.S. 100 (1981).....1

Fletcher v. Peck,
10 U.S. (6 Cranch) 187 (1810).....5

Gomez v. Toledo,
446 U.S. 635 (1980).....3

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987).....6

Marbury v. Madison,
5 U.S. (1 Cranch) 137, 163 (1803).....7

Murray v. City of Charleston, S.C.,
96 U.S. 432 (1878).....4

National Private Truck Council v. Oklahoma Tax Commission,
515 U.S. 582 (1995).....8, 9

Navarro Savings Ass'n. v. Lee,
446 U.S. 458 (1980).....1

Rowland v. California Men's Colony, Unit II Men's Advisory Council,
506 U.S. 194 (1993).....3

Spencer v. South Carolina Tax Commissioner,
281 S.C. 492, 316 S.E. 386 (1984),
aff'd by an equally divided court,
105 S.Ct. 1859 (1985)(*per curium*).....8

State Tax Commission v. Fondren,
387 So.2d 712, 723 (Miss. 1980)(*en banc*),
cert. denied, 450 U.S. 1040 (1981).....8

Stufflebaum v. Penthiere,
691 S.W.2d 271, (Mo. 1985).....8

Thomas v. N.A. Chase Manhattan Bank,
994 F. 2d 236 (5th Cir. 1993).....2

Trustees of Dartmouth College v. Woodward,
17 U.S. 518, 656-57 (1819).....4, 5

Walker v. Whitehead,
83 U.S. 314 (1872).....7

Zinermon v. Burch,
494 U.S. 113 (1990).....8

The Constitution of the United States of America

The United States Constitution .....*Passim*

United States Statutes and Rules:

FEDERAL STATUTES

28 U.S.C. § 1341, Tax Injunction Act.....1

28 U.S.C. § 1654.....3

42 U.S.C. § 1983.....*Passim*

FEDERAL RULES:

United States Supreme Court Rule 10.....10

Federal Rule of Civil Procedure 17(a).....2

PENNSYLVANIA STATUTES:

20 Pa. C.S. § 7131.....2, 3

72 P.S. § 5020-101 *et. seq. as amended*.....*Passim*

PENNSYLVANIA RULES

Pa. R. Civ. P. 2002.....3

MISCELLANEOUS:

Note Section 1983 In State Court:
A Remedy for Unconstitutional State Taxation,
95 Yale L.J. 414 9

Supreme Court Practice, Seventh Addition, 1993,
Robert Stern, Eugene Grassman, Stephen M. Shapiro,
Kenneth S. Geller, pp. 208-210.....10

INTRODUCTION

The decision of the Commonwealth Court of Pennsylvania should not be allowed to stand, because it incorrectly suggests that citizens cannot bring, under any circumstances, a § 1983 action to challenge unconstitutional state taxation in state courts. Assuming *arguendo* that this Honorable Court's decision in *Fair Assessment in Real Estate Association v. McNary*, 454 U.S. 100 (1981) closes the Federal courthouse doors to civil litigants pursuing § 1983 actions involving state taxation because of the Tax Injunction Act, it is fundamental that an "exhaustion" requirement superimposed on state tax § 1983 litigation does not comport with all due process components of the Fourteenth Amendment. *See e.g. Board of County Commissioners*, 253 U.S. 17 (1920)(taxpayer must have opportunity to challenge unconstitutional state taxation). It is worth of noting that not every trust instrument creates a corporation, or taxable association, or "taxpayer". The Respondents have arbitrarily misclassified this trust arrangement as a corporation for taxation purposes.

REASONS FOR GRANTING THE WRIT

I. Kepoint Preservation Trust is Not Named as a Party to This Action And Petitioner Brown Is A U.S. Citizen Holding The Right To "Make and Enforce Contracts" And Sue In Every State And Territory, And, As Such, May Plead His Own Case Personally.

Section II of the Respondent's Brief in Opposition states that "Brown's Petition For A Writ of Certiorari Should Be Denied Because He Cannot Represent Kepoint Preservation Trust *Pro Se* In This Action although it did not form the basis of any of the Pennsylvania Court's decisions..." Their assertion appears to serve only to attempt to distract the attention of this Court away from the questions presented because the lower courts were well aware, that Kepoint Preservation Trust (Hereinafter "Kepoint") is not, and was never named as a party in the state court proceedings below. Petitioner Brown commenced a §1983 action in his own right as a real party in interest held subject to a private declaration of trust contract embodied in a trust deed. The fact that Brown is a

trustee and real party in interest to the trust arrangement is not in dispute. He is defending his personal legal rights and fiduciary interests which are protected by federal law from impairment under color of State law and enforcing the terms of the executory trust agreement to convey against unlawful state action.

In support of his contention that trustees are real parties in interest and persons with the right to commence a § 1983 action, the Petitioner again directs the Court's attention to its holding in *Navarro Savings Ass'n. v. Lee*, 446 U.S. 458, 462 (1980). The *Navarro* Court stated clearly that:

> As early as 1808, the Supreme Court of the United States stated that "trustees of an express trust are entitled to bring diversity actions in their own names and upon the basis of their own citizenship. *Chappedelaine v. Dechenaux*, 4 Cranch 306, 308. Federal Rule of Civil Procedure 17(a) now provides that such trustees are real parties in interest for procedural purposes.

Id. at 462. In *Thomas v. N.A. Chase Manhatten Bank*, 994 F. 2d 236 (5th Cir. 1993), the Court of Appeals for the Fifth Circuit held that state law governed a trustee's capacity to sue. Applying Missouri law, the Fifth Circuit held that the trustee of an express trust has the power "[t]o prosecute or defend actions, claims, or proceedings for the protection of trust assets and of the trustee in the performance of his duties." *Thomas*, 994 F.2d at 243 (citations omitted).

Similarly, Pennsylvania law, namely 20 Pa. C.S. § 7131. Possession of real and personal property states the following:

> Except as otherwise provided in the trust instrument, the trustee, until it is distributed or sold, shall have the right to and shall take possession of, maintain and administer each real and personal asset of the trust, collect the rents and income from it, and make all reasonable expenditures necessary to preserve it. He shall also have the right to maintain any action with respect to real or personal property of the trust.

20 Pa. C. S. § 7131. In addition, 28 U.S.C. § 1654 provides that "[I]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel." Thus far, Petitioner Brown has chosen to proceed personally as a matter of right in accordance with 28 U.S.C. § 1654.

The Respondents rely on *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 202 (1993) to contend that Petitioner Brown may not represent the interests of the Kepoint Preservation Trust *pro se*. First, the *Rowland* Court observed that, with respect to federal courts, corporations as well as the unincorporated group of prisoners involved in the case could appear only through licensed counsel. The *Rowland* decision is not presidential in a state court action, especially one involving a trustee. Counsel for the Respondents acknowledged "that it has been unable to find any Supreme Court cases in which the above rule was specifically applied to matters involving a trustee." **Pa. R. Civ. P**. 2002 allows a trustee or other real party in interest to commence a § 1983 action in Pennsylvania courts. Under 28 U.S.C. § 1654, a party may plead and conduct their own cases personally in all courts of the United States.

Petitioner Brown does not have the burden of demonstrating that Pennsylvania's General County Assessment Law, namely 72 P.S. § 5020-101 et seq., (Hereinafter GCAL), violates rights under the constitution prior to a court of proper jurisdiction taking jurisdiction over his § 1983 claim. Two, and only two, allegations are required in order to state a § 1983 cause of action: (1) plaintiff must allege that some person has deprived him of federal right, and (2) plaintiff must allege that the person who has deprived him of that right acted under color of state or territorial law. *Gomez v. Toledo*, 446 U.S. 635 (1980). The purpose for seeking a judicial determination is to receive a ruling on the merits of the justicable controversy between the parties. The federal court doors were closed to Petitioner Brown's § 1983 action for a lack of subject matter jurisdiction. Similarly, the state court doors were closed when his state court action was dismissed for lack of subject matter jurisdiction. This result should be found by this Honorable Court to be unacceptable, especially where substantive due

process rights as well as underlying contract rights may be lost forever absent the granting of certiorari.

It is abundantly clear that Petitioner Brown has standing to proceed personally. This Honorable Court should not be distracted by the formula of smoke and mirrors conjured up by the Respondents in their Brief in Opposition but should grant careful consideration to Petitioner Brown's Petition for a Writ of Certiorari.

II. Whether The Respondents' Actions Utilizing State Taxing Powers Violate Petitioner Brown's Federal Rights, Privileges, Or Immunities Arising As A Result Of Contractual Relations Under The U.S. Constitution Is A Federal Question Which Can Only Be Properly Adjudicated Under 42 U.S.C. § 1983.

Pennsylvania's GCAL imposes tax on "all real estate to wit".[1] Notably absent from the Respondent's Brief in Opposition at section III-A, pp. 10-11, is their explanation of how the GCAL properly excludes realty from tax, which is held in the stage of its ownership not to be taxable. This Honorable Court stated clearly in *Murray v. City of Charleston*, 96 U.S. 432 (1877):

> We have held property in one stage of its ownership not to be taxable, and in a succeeding stage to be taxable...

Id. at 446. Simply put, the GCAL does not appear to provide an exclusionary clause to provide for fact that constitutional limitations prohibit the Commonwealth from taxing realty held in the one stage of ownership that this Court has held "not to be taxable."

The Respondents', in their Brief at pp. 14-17 contend that "[T]he Kepoint Preservation Trust is not a "contract" under the meaning of the Contracts Clause." However, this Court addressed this precise question in the famous and important case of *Trustees*

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[1] See Respondent's Brief at page 10, Section III-A at (a) and Petitioner's Brief at page 3 with respect to Pennsylvania's GCAL.

of Dartmouth College v. Woodward, 17 U.S. 518, 656-57 (1819) by stating:

> What is a contract? It may be defined to be a transaction between two or more persons, in which each person comes under an obligation to the other, and each reciprocally acquires a right to whatever is promised by the other. Powell on Cont. 6. Under this definition says Mr. Powell, it is obvious that every feoffment, gift, grant, agreement, promise, &c., may be included, because in all there is a mutual consent of the minds of the parties concerned in them, upon an agreement between them respecting some property or right that is the object of the stipulation. He adds, that the ingredients requisite to form a contract, are, parties, consent, and an obligation to be created or dissolved; these must all occur, because the regular effects of all contracts is, on one side, to acquire, and on the other, to part with, some property or rights; or to abridge, or to restrain natural liberty, by binding the parties to do, or restraining them from doing, something which before they might have done, or omitted. If a doubt could exist that a grant is a contract, the point was decided in the case of *Fletcher v. Peck*, 6 Cranch 87, in which it was laid down, that a contract is either executory or executed; the object of the contract is performed, and this differs in nothing from a grant; but whether or executory, they both contain obligations binding on the parties, and both are equally within the provisions of the constitution of the United States, which forbids the state governments to pass laws impairing the obligation of contracts.

Id. Trustees of Dartmouth College, 17 U.S. at 656-57. Here, if rights granted by the deed are so vested that interference with them impairs the obligation of the contract embodied in the deed, it necessarily follows that such interference deprives the grantee of his property without due process of law and impairs the obligation of the contract. The converse is equally true. Unless the tax can be sustained as an excise, it must fail altogether; if the statute were construed as imposing a property tax, it would be repugnant to the Constitution of Pennsylvania. It appears to require arbitrary or

discriminatory state action to impose tax on property disposed of and held in the stage of ownership this Court held not to be taxable within the jurisdiction of the United States simply by misclassifying the trust contract as a corporation, and "taxpayer" for taxation purposes.

Here, the subject property is held under terms of a declaration of trust embodied in a trust deed. It can require no argument that the trust instrument in the instant case constitutes a contract within the meaning of the federal Constitution. This principle is well established by this Court's holding in *Coolidge v. Long*, 282 U.S. 582, 595 (1930), that "[t]he trust deeds are contracts within the meaning of the contract clause of the Federal Constitution." The particular facts or the type of tax at issue is not relevant to the fact that a trust deed is a contract protected by the provisions of the federal Constitution. The *Coolidge* Court re-stated the rule that when the jurisdiction of this court is invoked to determine whether ...the state is depriving him of his property without due process of law in violation of the Fourteenth Amendment, and the question turns on the existence or terms of a contract, this court is bound to determine for itself whether there is a contract and to ascertain its true meaning and effect." *Id.* at 597.

The Respondents' attempt to use this Court's ruling in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987) to suggest that the Contract Clause been superceded by the police powers of the states. However, this Court stated as recently as 1978 in *Allied Structural Steel v. Spannaus*, 438 U.S. 234, (1978), that,

> [t]he Contract Clause receded into comparative desuetude with the adoption of the Fourteenth Amendment, and particularly with the development of the large body of jurisprudence under the Due Process Clause in modern constitutional history. Nonetheless, the Contract Clause remains part of the Constitution. It is not a dead letter. *Id.* at 241. The severity of an impairment of contractual obligations can be measured by the factors that reflect the high value the Framers placed on the protection of private contracts. Contracts enable individuals to order their

> personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them.

Id. at 245. In 1872, the United States Supreme Court in *Walker v. Whitehead*, 83 U.S. 314 (1872) stated the timeless principle that:

> Nothing is more material to the obligation of a contract than the means of its enforcement. The idea of validity and remedy are inseparable, and both are parts of the obligation which guaranteed by the Constitution against impairment...The States may change the remedy, provided that no substantial right secured by the contract is impaired. The States are no more permitted to impair the efficacy of a contract in this way than to attack its vitality in any other manner. Against all assaults coming from that quarter, whatever guise they may assume, the contract is shielded by the Constitution. It must be left with the same force and effect, including the substantial means of enforcement, which existed when it was made. The guarantee of the Constitution gives it protection to that extent.

83 U.S. at 317-318. An action at law or in equity provided by 42 U.S.C. 1983 is the only clear and complete remedy to enforce contractual rights, which are protected by the Fourteenth Amendment from impairment under color of state law.[2]

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[2] T]he very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high application, if the laws furnish no remedy for the violation of a vested legal right." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

III. Section 1983 Actions in State Court Are Necessary To Provide A Complete And Certain Remedy For Unconstitutional State Taxation.

Respondent Perkiomen Valley School District complains that the § 1983 cases cited by Petitioner Brown were not all state taxation cases at pp. 25-27 of its Brief.[3] However, there is a split of authority among the highest courts in several states even in this subset of civil rights litigation involving state taxation. See *Beverly Bank v. Board of Review*, 117 Ill. App.3d 656, 664-65, 453 N.E.2d 96, 102 (1983)(state court entertained state tax § 1983 claim), *cert. denied*, 104 S.Ct. 2153 (1984); *Dutoit v. Board of County Commissioners*, 233 Kan. 995, 1004-06, 667 P.2d 879, 888-90 (1983). *But see Beckus v. Chilivis*, 236 Ga. 500, 505, 224 S.E.2d 370, 374 (1976)(taxpayer may not circumvent state procedures by asserting § 1983 claim); *State Tax Commission v. Fondren*, 387 So.2d 712, 723 (Miss. 1980)(*en banc*), *cert. denied*, 450 U.S. 1040 (1981); *Stufflebaum v. Penthiere*, 691 S.W.2d 271, 272 (Mo. 1985)(*en banc*); *Spencer v. South Carolina Tax Commissioner*, 281 S.C. 492, 497, 316 S.E. 386, 388-389 (1984), *aff'd by an equally divided court*, 105 S.Ct. 1859 (1985)(*per curium*).

The Respondents' misinterpret the decision in *National Truck Council, Inc. v. Oklahoma Tax Commission*, 515 U.S. 582 (1995) as applied to the remedy provided under Pennsylvania's GCAL. Pursuant to this Court's ruling in *National Truck*, the state law must provide "a clear and certain remedy." If the state law does not provide "a clear and certain remedy", a § 1983 action may proceed without regard to the initiation or exhaustion of the inadequate state administrative remedies provided. As the Respondents' correctly point out, the Court in *National Truck* opined that because the plaintiffs did not dispute the adequacy of Oklahoma's legal remedies for the redress of tax disputes, Section 1983 "did not authorize the disruption of state tax administration."

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[3] Petitioner Brown cited certain cases including, for example, *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) because this Court appeared to distinguish a difference between the right of a plaintiff to proceed with substantive vs. procedural § 1983 claims.

Id. at 592. Here, the adequacy of Pennsylvania's legal remedies are, and were in dispute since the inception of the case[4] where the trust arrangement did not create a natural person, corporation, taxable association, or "taxpayer" as statutorily defined for taxation purposes. Therefore, Petitioner's 1983 action is proper before the Pennsylvania courts and this Court's precedent in *National Truck* should be interpreted to provide that civil rights actions alleging impairment under color of State law of the right to "make and enforce contracts" must be able to proceed in state courts where an adequate remedy does not exist under state law.

A § 1983 cause of action involving state taxation will not jeopardize the integrity of states' tax systems. In the first place, only a citizen deprived of a federal constitutional right will be able to assert a successful § 1983 action; most tax challengers lack this crucial element. Second, because the state tax § 1983 action lies in state court, rather than federal court where no exhaustion is required, state courts may be able to require a "taxpayer" to exhaust state administrative remedies before asserting his § 1983 action, if the administrative remedy is adequate pursuant to federal requisites. Finally, even if he is litigating substantial federal claim, as state tax § 1983 claimant will not be exempted from paying the tax he owes. Section 1983 neither alters the requirements necessary to obtain equitable relief nor prevents a state from enforcing its laws. Therefore, a taxpayer cannot, by asserting a § 1983 cause of action, prevent a state from taking its usual steps to collect any lawful taxes it has levied. *Note Section 1983 In State Court: A Remedy for Unconstitutional State Taxation*, 95 Yale L.J. 414, 430-31.

The issues raised in the petition are important to the rule of law for the nation at large as well as to the parties. The Respondent fails to recognize that the general considerations

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[4] *See* Petitioner's Brief, Appendix at 31(a), paragraph #20 alleging that: Plaintiff has an inadequate remedy at law that fails to (1) avoid multiplicity of suits (annual) (2) prevent irreparable injury to the Plaintiff involving his right and fiduciary duty to fulfill his lawful calling and contractual obligation absent arbitrary and unlawful impairment by Defendants (3) provide necessary equitable relief available in the form of a declaratory judgement and injunctive relief.

outlined in **U.S. Sup. Ct. R.** 10 are neither controlling nor fully measure the Court's Discretion. For example, this Court may exercise certiorari jurisdiction where the state court has held... or has sustained...the validity of a state statute as against a claim of repugnance to the federal Constitution", or to determine whether the state court has properly interpreted, applied, or extended a prior Supreme Court decision in a given situation, or despite the absence of a conflict, state court decisions involving the construction and application of federal statutes or treaties may be reviewed on certiorari where the question is sufficiently important, or where the state court decision seems "to present important questions touching the accommodation of state and federal interests under the Constitution. *See Supreme Court Practice, Seventh Addition*, 1993, pp. 208-210.

Petitioner Brown respectfully suggests that he has raised substantial federal questions involving his Due Process rights and established not one, but several important considerations relative to the appropriateness of exercising certiorari jurisdiction. The various federal questions involved in the case *sub judice* are questions that require a judicial determination.

CONCLUSION

The Court should grant this petition and directly address the application of the Exhaustion Doctrine to § 1983 actions commenced in state courts with respect to vested rights protected by Fourteenth Amendment and the Contract Clause of Article I, § 10 of the Federal Constitution.

Respectfully submitted this 14th Day of June, 2005,

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